SECTION 8(i)

DIGESTS

Settlements

In General

The administrative law judge erred in construing the deputy commissioner's order as a Section 8(i) settlement. The Board noted the order contained no findings regarding whether the compensation awarded was in claimant's best interests and did not provide for the complete discharge of employer's liability for payment of compensation. Rather, the order stated that the file will be closed "subject to the limitations of the Act or until further Order of the deputy commissioner." Thus, it was not a settlement, but must be considered an award based upon the agreements and stipulations of the parties pursuant to 20 C.F.R. §702.315. Such awards are subject to Section 22 modification since they do not provide for the complete discharge of employer's liability or terminate claimant's right to benefits. *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988).

Where there is no evidence that an informal agreement between the parties was approved by a deputy commissioner or an administrative law judge, the agreement does not discharge any liabilities of employer. *Falcone v. General Dynamics Corp.,* 21 BRBS 145 (1988).

The Board held that, regardless of the parties' intent, the deputy commissioner's Compensation Order could not be construed as a Section 8(i) settlement as it contained no findings regarding whether the compensation awarded was in claimant's best interests, see 33 U.S.C. §908(i) (1982)(amended 1984), and did not provide for the complete discharge of employer's liability. The Board held that the order must be considered an award based upon the agreements and stipulations of the parties pursuant to 20 C.F.R. §702.315. *Madrid v. Coast Marine Construction Co.,* 22 BRBS 148 (1989).

Where the administrative law judge's award failed to provide for the complete discharge of employer's liability and does not contain findings as to whether the compensation awarded was in claimant's best interest, it did not constitute the approval of a settlement. It constituted instead an award of benefits based on the agreements and stipulations of the parties, which is subject to Section 22 modification. *Finch v. Newport News Shipbuilding and Dry Dock Co.,* 22 BRBS 196 (1989).

Board rejects claimant's contention that his settlement of his asbestosis claim did not constitute compensation for permanent total disability. Board therefore affirmed the administrative law judge's finding that claimant was permanently totally disabled due to his asbestosis, was compensated for his entire loss of wage-earning capacity, and therefore is not entitled to any additional compensation due to his alleged permanent total disability due to stomach cancer, which became manifest after the settlement for asbestosis. *Hoey v. Owens-Corning Fiberglas Corp.,* 23 BRBS 71 (1989).

The Board affirmed the administrative law judge's finding that claimant's hearing loss claim is not barred by his prior third-party recovery for a crush injury, since there is no decision finding that the crush injury caused disability under the Act and only the claim for claimant's unrelated hearing loss is being made against employer. Additionally, the recovery could not be a settlement under Section 8(i) of the Act since there was no approval by the deputy commissioner or administrative law judge. *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992), *vacated on other grounds mem.*, 17 F.3d 396 (9th Cir. 1994).

The Board holds it unnecessary to remand to the administrative law judge for consideration of whether the parties submitted a complete settlement application because the settlement agreement as submitted was deficient under Section 702.242(a) as a matter of law. An unsigned settlement application which does not include a statement explaining how the settlement amount is considered adequate is not a complete application under Section 702.242(a) and (b)(6). Accordingly, the 30 day automatic approval period was tolled as a matter of law under 20 C.F.R. §702.243(a) when the deputy commissioner found the application deficient and therefore the administrative law judge erred in finding that the proposed settlement agreement had been deemed automatically approved. *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

The Board holds that deputy commissioner properly found that the settlement application's discussion of the adequacy of the proposed settlement was incomplete because it stated only that the settlement was in claimant's best interest and did not contain any specific information justifying the adequacy of the amount agreed to or clearly outline potential disputed issues as is required under 20 C.F.R. §702.242(b)(2), (6). *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

On reconsideration the Board held that the regulations at 20 C.F.R. §§702.241-702.243, concerning the contents of a complete settlement agreement are consistent with the automatic approval provision of Section 8(i) of the Act. The Board stated that the regulations properly implement congressional intent by providing an administrative framework for the submission of an application and ensure that the approving official obtains the information necessary to determine whether the settlement application is inadequate or procured by duress. *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991).

The Board holds that the administrative law judge erred in concluding that employer was represented by counsel at the time at which the parties entered into the proposed settlement agreement. The term "counsel" as it applies to representation in agreed settlements is specifically defined by Section 702.241(h), 20 C.F.R. §702.241(h), as "any attorney admitted to the bar of any state, territory, or the District of Columbia." Because a claim examiner was not a licensed attorney, employer was not represented by counsel. The issue of whether the parties were represented by counsel, however, was not determinative in this case, as it pertains to whether the settlement was deemed approved because deficiencies in the settlement application rendered the settlement agreement incomplete as a matter of law and served to toll the 30 day automatic approval period under 20 C.F.R. §702.243(a). *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

In its *en banc* decision on reconsideration, the Board rejected employer's argument that the Board erred in its initial Decision and Order in addressing the completeness of the settlement application under the regulations in determining whether the parties' proposed settlement agreement had not been deemed automatically approved pursuant to Section 8(i) prior to being specifically disapproved by the district director. The Board held that the issue of whether the proposed agreement was deemed approved was before the Board on appeal and could not be resolved without review of the agreement under the applicable regulations. *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991).

While the Board has recognized that parol evidence may be used in construing settlements under 33 U.S.C. §933, *see, e.g., Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), the use of parol evidence appears to be proscribed under Section 702.242(a) in the case of Section 8(i) settlements applications. It appears that the administrative law judge violated 20 C.F.R. §702.242(a) by considering an affidavit submitted to him by an attorney from employer's legal department and relying on it to find that employer was represented by counsel. *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

The Board reverses administrative law judge's finding that parties' agreement which remained pending 90 days after the enactment date of the 1984 Amendments was automatically deemed approved by operation of law where the settlement agreement as submitted did not satisfy the applicable regulations, 20 C.F.R. §§702.242(b), 702.243(a). The Board noted that the settlement agreement as submitted was not a self-sufficient document which included all the documentation necessary to constitute a complete settlement application and that even several documents viewed together did not constitute a complete settlement application. The Board also noted that because the only statement regarding the adequacy of the settlement amount lacked any specific information which justified the amount agreed to, the settlement application was deficient for failure to comply with Section 702.242(b)(6). *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J. dissenting).

Where claimants seeks to terminate his compensation claim for a sum of money, Section 8(i) settlement procedures must be followed. Because the parties failed to supply the requisite supporting documentation in this case and the claims examiner's letter approving the parties' agreement did not contain any findings regarding whether the compensation awarded was in claimant's best interests or provide for the complete discharge of employer's liability, stating only that the matter would be closed "subject to the limitations of the Act," the Board found that there was no approval of the parties claim under the 1972 Act. *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting).

For the reasons stated in *McPherson*, 26 BRBS 71 (1992), the Board rejects employer's contention that the Board erred in *sua sponte* considering the effect of the settlement regulations at 20 C.F.R. §§702.242, 702.243. Similarly, the Board rejects employer's contention that these regulations are invalid and internally inconsistent. Since the parties' 1977 "agreement" is incomplete under Section 702.242, the automatic approval provision of Section 8(i) is tolled under Section 702.243. *Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991).

The filing of a compromise and release on a state form with the district director does not constitute an application for a Section 8(i) settlement where: 1) it does not satisfy the requirements of the regulations; 2) it is not submitted in accordance with Section 8(i); and 3) its sole purpose is to finalize the settlement of the state claim. The administrative law judge's finding that the parties settled the claim is reversed and the case is remanded for a decision on the merits. *Henson v. Arcwel Corp.*, 27 BRBS 212 (1993).

Inasmuch as the evidence of record does not contain a completed Section 8(i) settlement

agreement in accordance with 20 C.F.R. §§702.241-702.243, and claimant did not raise the issue at the formal hearing, the Board is precluded from considering claimant's proposed agreement that was attached to his Petition for Review and brief and therefore denied claimant's request to either enforce the settlement or remand the case to the administrative law judge for further findings concerning the document. *Nelson v. American Dredging Co.*, 30 BRBS 205, 208 (1996), *aff'd in pert. part,* 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

The Third Circuit held that claimant's contentions that the Board erred in affirming the administrative law judge's refusal to enforce the alleged settlement agreement and his rejection of claimant's contention that employer waived its right to challenge coverage are without merit. Specifically, the court observed that the applicable regulations, 20 C.F.R. §702.241-702.243, prescribe in detail the procedures for, and the necessary contents of, settlement applications under the Act, and held that in accordance with the Board's decision, the parties never complied with these regulations. The Third Circuit explicitly determined that there was at most an "agreement in principle'' to settle, which never matured. *Nelson v. American Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998), *aff'g in pert. part* 30 BRBS 205 (1996).

The Board holds that under both Section 702.241(b) and Section 702.243(a), (b), the 30-day automatic approval provision of Section 8(i) was properly tolled until the case record was returned to the district director from the 11th Circuit. Thus, contrary to claimant's contention, the district director's consideration and approval of the parties' Section 8(i) settlement is timely as it occurred within 30 days of his receipt of the remanded case, and employer timely paid with regard to this approval. Thus, employer is not liable for interest and penalties. *Jenkins v. Puerto Rico Marine*, 36 BRBS 1 (2002).

The Board denied employer's request that the parties' prior settlement of claimant's FELA action be deemed a settlement under Section 8(i), as the purpose of the settlement was to finalize the FELA action, not the settlement of claimant's longshore claim, and was not submitted in accordance with Section 8(i) or its implementing regulations. *Wilson v. Norfolk & Western Ry. Co.*, 32 BRBS 57 (1998), *rev'd mem.,* 7 Fed. Appx. 156 (4th Cir. 2001).

Claimant was injured while working for a borrowing employer. Claimant filed a claim under

the Act against the nominal (lending) employer, which they settled pursuant to Section 8(i). Claimant then filed a claim against the borrowing employer for benefits under the Act after his lawsuit in federal district court was dismissed. The Board affirmed the administrative law judge's finding that as the statutory (borrowing) employer was not a party to the claim that was settled, the settlement does not discharge its liability. This result is consistent with *Alexander,* 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002) and *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), which stand for the proposition that the responsible employer is fully liable to the claimant notwithstanding his recovery in settlement from other potentially liable employers. Thus, the award of benefits against the borrowing employer is affirmed. *Sears v. Norquest Seafoods, Inc.*, 40 BRBS 51 (2006).

Person Authorized to Approve Settlements

Section 8(i) as amended in 1984 applies to pending cases and allows administrative law judges to approve lump-sum settlements, overruling *Ingalls Shipbuilding Div., Litton Systems Inc. v. White,* 681 F.2d 275 (5th Cir. 1982)(Board never followed this case outside 5th Circuit). *Downs v. Director, OWCP,* 803 F.2d 193, 19 BRBS 36 (CRT) (5th Cir. 1986), *aff'g Downs v. Texas Star Shipping Co.,* 18 BRBS 37 (1986).

The Board rejected the Director's challenge to the administrative law judge's authority to approve a pre-amendment settlement, relying on *Clefstad v. Perini North River Assocs.,* 9 BRBS 217 (1978). In upholding the administrative law judge's approval of the settlement, the Board reiterated its previous statement that it would not follow *White,* 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982), in cases arising outside the Fifth Circuit, and noted that even in the Fifth Circuit, White has been essentially rendered inapplicable in cases decided after the effective date of the 1984 Amendments. *Georges v. Todd Shipyards Corp.,* 20 BRBS 32 (1987).

Board affirms administrative law judge's approval of Section 8(i) settlement, holding that the administrative law judge has the authority to approve settlements under both pre-1984 Amendment Board law and the 1984 Amendments to Section 8(i). *Ziemer v. The Stone Boat Yard,* 21 BRBS 74 (1988).

Because a claims examiner lacks the authority to approve a Section 8(i) settlement, Board holds claims examiner's purported approval of the parties' agreement a nullity and that accordingly, the administrative law judge properly determined that the parties' agreement remained pending on the enactment date of the 1984 amendments. *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown J., dissenting).

When Claims May Be Settled

Both 20 C.F.R. §702.241(g) and Section 8(i) prohibit settlement of the right to survivor's benefits before it arises, i.e., before the death of the injured worker. Oceanic Butler, Inc. v. Nordahl, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988), aff'g 20 BRBS 18 (1987); Cortner v. Chevron International Oil Co., Inc., 22 BRBS 218, (1989).

Approval of Settlements; Miscellaneous

Based on its decision in Maher v. Bunge Corp., 18 BRBS 203 (1986), the Board affirmed the deputy commissioner's disallowance of employer's attempt to withdraw from a settlement. Specifically, the Board: (1) declined to distinguish this case from Maher on the grounds that this was a post-amendment settlement, was an OCSLA case and involved a death claim as well as a disability claim; and (2) reaffirmed its holding in Maher that an employer which has agreed to settle a claim may not withdraw from the settlement solely because claimant has died. Nordahl v. Oceanic Butler,Inc., 20 BRBS 18 (1987), aff'd, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988).

The Fifth Circuit affirmed the Board's decision in Nordahl that employer cannot withdraw from a settlement due to the death of the claimant prior to the settlement's approval. The court noted that claimant's obligation under the settlement contract - to accept the sum agreed upon and to waive compensation otherwise payable - is invalid when made by virtue of Section 15(b) and is not binding until and unless there is administrative approval of the settlement. Thus, claimant can withdraw from a submitted, but unapproved, settlement. Employer's obligation under the settlement contract, on the other hand, to pay the designated amount in exchange for a release of liability under the Act, is not rendered invalid by the Act when it is created, although its obligation to perform its part of the contract is conditioned upon approval of the settlement. Thus, absent language in the settlement itself, employer cannot withdraw from or rescind an unapproved settlement. The court also discusses policy considerations underlying Section 8(i). Oceanic Butler, Inc. v. Nordahl, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988), aff'g 20 BRBS 18 (1987).

Where the employee died (due to a cause unrelated to his work accident) before a settlement agreement had been presented to the deputy commissioner or the administrative law judge for approval, before an agreement's terms had been approved by him, the Board affirmed the administrative law judge's determination that no enforceable settlement agreement existed under Section 8(i) of the Act. *Fuller v. Matson Terminals*, 24 BRBS 252 (1991).

Where a settlement agreement had not been signed by the parties or submitted for approval prior to the death of the employee, the Board affirmed the administrative law judge's determination that no valid settlement agreement existed under Section 8(i) of the Act. *Henry v. Coordinated Caribbean Transport*, 32 BRBS 29 (1998), *aff'd,* 204 F.3d 609, 34 BRBS 15 (CRT)(5th Cir. 2000).

The Fifth Circuit held that where a settlement agreement had not been signed by the parties or submitted for approval prior to the death of the employee, no valid agreement existed under Section 8(i) of the Act, and therefore, the settlement was unenforceable. The court distinguished *Oceanic Butler v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT)(5th Cir. 1988), as that case concerns the rights of the parties to withdraw from a settlement that was executed pursuant to the regulations and submitted for administrative approval prior to the claimant's death. *Henry v. Coordinated Caribbean Transport*, 240 F.3d 609, 34 BRBS 15(CRT) (5th Cir. 2000), *aff'g* 32 BRBS 29 (1998).

Where a settlement agreement had been proposed which contained the negotiated positions of the parties, but the document had not been signed by the employee or submitted for administrative approval prior to the employee's death, the Board affirmed the administrative law judge's determination that no valid Section 8(i) settlement agreement existed. The Board rejected claimant's argument that *Henry,* 204 F.3d 609, 34 BRBS 15(CRT) (5th Cir. 2000), *aff'g* 32 BRBS 29 (1998), is distinguishable on the basis that the parties' agreement in *Henry* was not embodied in a formal settlement application prior to the employee's death whereas here such an application had been prepared, although it had not been signed by decedent or submitted for approval prior to his death. *O'Neil v. Bunge Corp.,* 36 BRBS 25 (2002), *aff'd,* 365 F.3d 820, 38 BRBS 7(CRT) (5th Cir. 2004).

The parties orally agreed to the terms of a settlement prior to the claimant's death, but had not signed a settlement agreement. Thus, the court affirmed the finding that the parties had not reached an enforceable agreement, as the application for settlement was not complete without reference to external evidence, contrary to the regulation at 20 C.F.R. §702.242. *O'Neil v. Bunge Corp.*, 365 F.3d 820, 38 BRBS 7(CRT) (5th Cir. 2004), *aff'g* 36 BRBS 25 (2002).

In this *pro se* appeal, the Board affirmed the administrative law judge's finding that he lacked jurisdiction to rule on claimant's motion to rescind an approved Section 8(i) settlement, noting that unilateral rescission is not permitted, citing *Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), and as claimant did not file a timely motion for reconsideration of the approval. The Board further held that it lacked jurisdiction to review the merits of the decision approving the settlement as claimant did not file an appeal to the Board within 30 days of the date the decision was filed. Moreover, claimant's motion to rescind the settlement agreement filed with the administrative law judge was not considered an appeal of his order approving the settlement under 20 C.F.R. §802.207(a)(2) as the motion was not a misdirected notice of appeal to the Board and did not evince an intent to seek Board review of the approved settlement but was directed to the administrative law judge, who ruled on it. Additionally, the Board held that it was not in the interest of justice to consider claimant's motion to rescind the settlement agreement as a timely appeal of the approval of the settlement in light of the policy favoring the finality of settlements. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.*, 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP,* 176 F.3d 484 (9th Cir. 1999)(table), *cert. denied,* 528 U.S.1052 (1999).

Pursuant to *Nordahl,* 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), a claimant's agreement to waive his compensation is not binding upon him unless it is administratively approved, either through the settlement process or pursuant to a withdrawal under 20 C.F.R. §702.225. In this case, the claimant notified the employer and the administrative law judge prior to and at the hearing that he considered the settlement inadequate and procured under duress. Thus, the Board vacated the administrative law judge's order approving the settlement agreement and held that claimant effectively withdrew from the settlement prior to its approval. The Board remanded the case to the administrative law judge for consideration on the merits. *Rogers v. Hawaii Stevedores, Inc.*, 37 BRBS 33 (2003).

The Board affirmed the administrative law judge's approval of a settlement as it did not include an express right of rescission by employer. In this case, employer attempted to withdraw from an executed settlement agreement that had been approved by the administrative law judge on the grounds that claimant had returned to work. While acknowledging that, pursuant to *Nordahl,* 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), an employer may bargain for the inclusion of an express reservation of a right of rescission should some specific event occur prior to approval by the administrative law judge, the Board held that, as the settlement agreement did not specifically provide for such a right, the administrative law judge properly declined to set aside the executed and approved settlement. The agreement called only for a credit should claimant return to work and re-injure himself. *Hansen v. Matson Terminals, Inc.,* 37 BRBS 40 (2003).

As the parties agreed that “wharf gang member” and “laborer” were separate positions, the Board affirmed the administrative law judge’s finding that claimant, who returned as a wharf gang member, made no misrepresentations to employer which would require the approved settlement agreement to be vacated. The agreement stated that claimant’s injury prevented him from returning to work as a laborer. *Hansen v. Matson Terminals, Inc.,* 37 BRBS 40 (2003).

The U.S. Court of Appeals for the District of Columbia Circuit upheld a denial of Section 22 modification of a pre-1984 settlement, relying in part on Downs, 803 F.2d 193, 19 BRBS 36 (CRT). The court also upheld the deputy commissioner's determination that the settlement was in claimant's best interest under the pre-1984 Amendment standard. Bonilla v. Director, OWCP, 859 F.2d 1484, 21 BRBS 185 (CRT) (D.C. Cir. 1988), amended, 866 F.2d 451 (D.C. Cir. 1989).

Board holds that the administrative law judge erred in addressing, sua sponte, the issue of D.C. Act jurisdiction, given that the parties had entered into a Section 8(i) settlement that had been approved by the deputy commissioner. The administrative law judge thus was empowered only to decide a factual issue regarding employer's liability for certain medical expenses. Kelley v. Bureau of National Affairs, 20 BRBS 169 (1988).

The Board held that the lump sum settlement of $50,000 complied with the requirements of Section 8(i) and was therefore not subject to Section 22 modification, noting that the agreement was neither "inadequate" nor "procured by duress," and that the approval discharged the liability of employer for further compensation. The Board rejected claimant's contention that he had an independent right to request rehabilitation services pursuant to Section 39 and the regulations at 20 C.F.R. §§702.502, 702.504-507. The Board held that under Section 8(i), claimant's settlement completely discharged his rights to seek any form of additional compensation under the Act. Had claimant wished to receive reimbursement for vocational rehabilitation services, he should have requested that such services be included as part of the settlement. In addition, the Board reasoned that if vocational rehabilitation was paid for by the Special Fund, an additional financial burden would be placed on employer in the form of assessments to the fund under Section 44(c)(2), contrary to the terms of the settlement. *Olsen v. General Engineering & Machine Works*, 25 BRBS 169 (1991).

The Board, citing *Bonilla*, 859 F.2d 1484, 21 BRBS 185(CRT)(D.C. Cir. 1988), reiterates in a D.C. Act case that Section 22 modification is not available to reopen or challenge a settlement agreement which has been entered into and approved pursuant to Section 8(i). Moreover, as the Board is not a "court," it does not have the equitable power to overturn a settlement agreement entered into and approved pursuant to Section 8(i). *Rochester v. George Washington University*, 30 BRBS 233 (1997).

The Board affirms grant of summary judgment in employer's favor, where claimant sought modification and administrative law judge rationally found that the parties previously entered into a Section 8(i) settlement which was final. Although neither the agreement itself nor the administrative law judge's order of approval explicitly referred to Section 8(i), the administrative law judge who entertained the modification petition properly noted that this is not required under the Act and that Section 702.242(a) was complied with. Moreover, inasmuch as the judge evaluated the agreement and found it adequate and not procured by duress, the standard applicable under Section 8(i), the administrative law judge on modification reasonably interpreted the order as approving a Section 8(i) settlement. Finally, while claimant argued for the first time on appeal that the parties' agreement was not a valid Section 8(i) agreement because of omissions or technical deficiencies in the documentation underlying the settlement application, the Board held that the validity of the agreement underlying a Section 8(i) settlement order is not subject to an attack in modification proceedings under Section 22, but rather raises legal issues which must be timely appealed under Section 21. *Diggles v. Bethlehem Steel Corp.,* 32 BRBS 79 (1998).

Employer accepted liability for future medical benefits pursuant to the terms of a settlement agreement. The district director's approval of the settlement agreement was the final adjudication of claimant's hearing loss claim. Accordingly, employer's liability for replacement hearing aids may not be collaterally attacked in a subsequent proceeding. The terms of the settlement agreement conclusively resolved the issue of the responsible employer for claimant's future medical benefits. *Jeschke v. Jones Stevedoring Co.*, 36 BRBS 35 (2002).

The Fifth Circuit holds that an approved Section 8(i) settlement precludes a claimant from pursuing a Jones Act suit for the same injury. *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 26 BRBS 59 (CRT) (5th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

The Board affirms the administrative law judge's approval of a settlement for hearing loss due to noise exposure. Although the terms of the settlement relieve employer of liability for "future" claims, the Board construes the settlement as limited to the hearing loss for which benefits were sought inasmuch as claimant last worked for employer in 1959 and in light of the fact that there can be no future claims against employer absent additional exposure to noise. *Kelly v. Ingalls Shipbuilding, Inc.,* 27 BRBS 117 (1993).

In two consolidated hearing loss cases where the administrative law judge approved the parties' stipulations in the form of a Section 8(i) settlement, the Board rejected the Director's contentions that the settlements do not satisfy the requirements of Section 702.242 of the regulations. Particularly, the Board held: a) Section 702.242(b)(2) does not require the settling parties to "outline" the disputed issues, as the parties complied with the regulation in that they listed disputed issues and stated their reasons for settlement; b) In hearing loss cases where claimants are retirees, an audiogram, upon which the claim and settlement are based, is sufficient for purposes of Section 702.242(b)(5), which requires a current medical report be attached to the settlement agreement; c) the administrative law judge's finding that the settlements are adequate and satisfy the requirements of Section 702.242(b)(6), is rational; d) Neither the Act nor the regulations requires settlements to be made in lump sum payments as the Director contends; e) Although the Director challenged the validity of two particular phrases used by the administrative law judge in approving the settlements, the administrative law judge unambiguously explained that his approval and the settlements are limited to the present cases. Moreover, as claimants are retirees, they are unlikely to return to the workforce and be exposed to industrial noise. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993).

The Board affirmed the administrative law judge's approval of a settlement agreement between employer and claimant which provided that the Special Fund is liable for claimant's pre-existing hearing loss, even though the Director did not directly participate in the settlement. In the instant case, the district director had previously approved employer's Section 8(f) application, noting that based on a pre-existing 11.3 percent monaural hearing loss, the Special Fund is liable for 5.9 weeks of compensation; thus, the settlement did not bind the Special Fund to anything to which the Director had not previously agreed. The Board held that since employer's entitlement to Section 8(f) relief was established prior to the settlement, the Director constructively participated in the settlement process. In addition, the Board held that the discharge of employer's potential liability for death benefits contained in the settlement agreement does not warrant its invalidation; the agreement as a whole indicates the parties' intention to settle the claim for a 15 percent binaural hearing loss; thus, the Board concluded that the administrative law judge's approval is limited to the hearing loss claim before him. *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993).

The Board distinguished the facts of two consolidated hearing loss cases, where the district director either deferred adjudication of employer's request for Section 8(f) relief or approved employer's request but did not indicate the extent of the Special Fund's liability, from *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 84 (1993), and held that the Director did not constructively participate in either settlement process. Because the Director did not participate, explicitly or constructively, and the administrative law judge used the incorrect average weekly wage, the administrative law judge erred in approving settlement agreements which affect the liability of the Special Fund. *Byrd v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 253 (1993).

Where the parties settled the claim for decedent's disability benefits by agreeing that employer should pay the court, which would then pay decedent's estate, the Board held that the settlement between the parties accords with its interpretation of Section 8(d), affects neither the rights nor the liability of the Special Fund, and completely discharges employer's liability, as decedent's estate, and not the Special Fund, is entitled to his scheduled permanent partial disability benefits which accrued prior to his death. Consequently, the Board held that the settlement comports with Section 8(i) of the Act; therefore, it rejected the Director's contentions and affirmed the administrative law judge's approval of the settlement. *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994).

To the extent that claimant is attempting to collaterally attack a 1981 settlement, the Board states that the district director correctly approved a settlement agreement pursuant to Section 8(i) as claimant was represented by counsel, the district director reasonably found that, at the time of the settlement, claimant "may have difficulty in establishing his claim," and determined that the settlement was in claimant's "best interest" and that it would discharge employer's liability. *Rochester v. George Washington University*, 30 BRBS 233 (1997).

The Board reversed the administrative law judge's conclusion that Section 8(i)(4) requires the Director to raise objectionable settlement terms. Specifically, the Board held that Section 8(i)(4) imposes no duty on the Director but rather automatically acts to prohibit the Special Fund from being held liable for reimbursement of sums voluntarily paid by employer or paid under a settlement. Thus, a settlement provision which purports to reserve an employer's right to later seek Section 8(f) relief or to set the Fund's liability when the Director has not participated in the settlement is void as a matter of law. Because the provision in the settlement in this case is void as a matter of law, the Board also reversed the administrative law judge's award of Section 8(f) relief. *Strike v. S. J. Groves & Sons*, 31 BRBS 183 (1997), *aff'd sub nom. S.J. Groves & Sons v. Director, OWCP,* 166 F.3d 1206 (3d Cir. 1998)(table).

Rejecting employer's argument that the Board's holding in *Strike,* 31 BRBS 183 (1997), *i.e.,* that the language of Section 8(i)(4) protects the Special Fund from liability after an employer enters into a Section 8(i) settlement with a claimant, applies only where Section 8(f) is requested after the settlement is approved, the Board affirmed the administrative law judge's determination that employer's claim for Section 8(f) relief is prohibited by Section 8(i)(4). The Board held that a settlement is entered into when it is executed by the parties, not when it is administratively approved. Moreover, the simultaneous submission of the settlement agreement and the stipulations and exhibits in support of employer's claim for Section 8(f) relief foreclosed the administrative law judge's consideration of the request for Section 8(f) relief, since the speedy resolution mechanism of Section 8(i)(1) prevents any delay in litigating issues necessary for a Section 8(f) determination. Consequently, once the settlement is approved, claimant's entitlement is fixed and employer's liability is discharged; Section 8(i)(4) prevents the transfer of liability under the settlement to the Special Fund, and as employer's liability is discharged, the Fund's derivative liability is also discharged. *Cochran v. Matson Terminals, Inc*., 33 BRBS 187 (1999).

The Ninth Circuit rejected the Director's contention that the administrative law judge and Board should not have awarded Section 8(f) relief based on a stipulation in which the Director did not concur, since the stipulations, that the employee could not return to his usual employment and setting the employee's residual wage-earning capacity and employer's liability for attorney's fees, did not purport to establish the Special Fund's liability in violation of Section 8(i)(4). The Director participated in the hearing, but did not object to the matters on which the parties stipulated; thus, his right to object was waived. The Ninth Circuit further observed that the administrative law judge heard evidence and independently arrived at the finding, not based on the stipulation, that the employer was entitled to Section 8(f) relief because of the employee's previous broken back. *Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131(CRT)(9th Cir. 1998).

Noting that the facts of the instant case are similar to those presented in *Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT)(9th Cir. 1998), and are distinguishable from those presented in *Strike,* 31 BRBS 183 (1997), and *Cochran,* 33 BRBS 187 (1999), the Board affirmed the administrative law judge's finding that employer is entitled to Section 8(f) relief and that its entitlement is not precluded by Section 8(i)(4). The Board noted that like *Coos Head Lumber*, the private parties' settlement agreement did not seek to subject the Special Fund to liability and that while it did affect the liability of the Special Fund in that it set out the extent of permanent disability and the level of claimant's loss of wage-earning capacity, the Director had already conceded those issues as well as employer's entitlement to Section 8(f) relief "upon agreement of the parties as to the extent of permanent disability and/or the level of claimant's loss in wage-earning capacity." Additionally, the Board observed that the Director's concession regarding Section 8(f) relief for liability based on the agreement of the parties as to claimant's loss in wage-earning capacity is the distinguishing feature from *Strike* and *Cochran*. *Nelson v. Stevedoring Services of America*, 34 BRBS 91 (2000), *aff'd on recon.,* 35 BRBS 55 (2001).

On reconsideration, the Board clarified its earlier decision, holding that the administrative law judge's decision reflects an approval of a Section 8(i) settlement agreement which is not subject to modification. The Board however also holds employer's claim for Section 8(f) relief is not barred by Section 8(i)(4). The Board relied on the fact that the Director explicitly, in writing, conceded employer's entitlement to Section 8(f) relief for any permanent partial disability in his pre-hearing statement, whether after a hearing or upon agreement of the parties. The Director thus gave his specific approval to the parties' resolving this claim by agreement and nothing in the Director's document restricted this approval to agreements based on stipulations as opposed to ones contained in an approved Section 8(i) settlement. The Director provided this approval *prior* to the time that the parties entered into their agreement and sought and received approval by the administrative law judge. Moreover, the Board noted that the purpose of Section 8(i)(4) was satisfied as the Director was provided with, and in fact participated in the case, prior to the time the settlement was entered into. *Nelson v. Stevedoring Services of America*, 35 BRBS 55 (2001), *aff'g on recon.* 34 BRBS 91 (2000).

The Board reversed the administrative law judge's finding that claimant's awareness of a work-related right knee injury at the time he entered into a settlement for other conditions precludes his seeking medical benefits for the right knee. The Board holds that including an additional injury under the boilerplate "Settlement includes all issues . . . which could have been raised . . . for . . . any injuries caused by Employer" is overbroad. The settlement was specifically for injuries to the left knee, left groin and back. Even if claimant were aware of a right knee injury, the claim for it was not yet in existence, and claimant had not sought medical treatment for this injury. Therefore, it was impossible for the settlement to contain the specific regulatory criteria necessary for a proper settlement, 20 C.F.R. §702.242. The case is remanded for the merits. *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999) (McGranery, J., concurring).

The parties' settlement agreement contained a "credit provision" stating that if claimant returned to longshore work and was permanently injured via new injury or aggravation, then employer or any other Signal Mutual member is entitled to a credit for some of the settlement amount. The Board vacated the administrative law judge's approval of the parties' settlement agreement, holding that it was not "limited to the rights of the parties and to claims then in existence" pursuant to 20 C.F.R. §702.241(g) because it affected claimant's rights with regard any future new, unrelated injury he might sustain. The Board also held that the agreement was invalid because the "credit provision" is not encompassed by any existing statutory or extra-statutory credit scheme under the Act. No credit is applicable where there has been no aggravation, and even if an aggravation were to occur, *Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) does not apply because the courts have declined to extend the *Nash* credit doctrine to cover non-scheduled injuries. The Board vacated the settlement approval and remanded the case for further proceedings to resolve claimant's claim. *J.H. v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008).

Effect of Disapproval

Where a Section 8(i) settlement application is disapproved by the deputy commissioner, any party to the settlement may request a hearing before an administrative law judge or submit an amended application to the deputy commissioner. 20 C.F.R. §702.243(c). Accordingly, this case was properly forwarded to the administrative law judge once the settlement was disapproved by the deputy commissioner. *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

Although a claims adjuster for employer did sign the portion of the settlement application regarding the settlement of the disability claim, his failure to sign the portion of the settlement application which dealt with settlement of the medical benefits renders the entire settlement application incomplete because under 20 C.F.R. §702.243(e), if either portion of a combined compensation and medical benefit settlement is disapproved, the entire application is disapproved unless the parties indicate on the face of the application that they agree to settle each portion independently. *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

In this case, one district director disapproved the parties' settlement application due to its inadequacy. The claim was then transferred to another district for processing. Following claimant's subsequent unilateral letter stating that he considered the amount adequate, the second district director approved the settlement over employer's objection. The Board vacates the approval of the settlement, holding that the second district director was without authority to rule on the application after it was disapproved. The only actions permitted following disapproval are requesting a hearing or submitting an amended application. The Board further holds that while "any party" may request a hearing, an amended application must be submitted in accordance with the regulations concerning an initial application, which necessarily requires the agreement of all parties. One party cannot resubmit the rejected application with additional documentation. *Towe v. Ingalls Shipbuilding, Inc.*, 34 BRBS 102 (2000).

The Board holds that a disapproved settlement application is not void as a matter of law, as this would negate the provision of 20 C.F.R. §702.243(c) permitting "any party" to request a hearing upon disapproval. The Board holds, however, that a disapproved settlement is voidable at employer's election, due to a failure of consideration on claimant's part, as claimant cannot waive his right to compensation absent compliance with Section 8(i). In this case, employer took action to void the agreement. The Board rejects the Director's contention that this right of rescission must be stated in the agreement itself (as with the right to withdraw upon the claimant's death, *Nordahl,* 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988)), holding that as administrative approval is a condition precedent to claimant's performance of his contractual obligation, the failure of this condition to occur obviates employer's performance of its contractual promise. *Towe v. Ingalls Shipbuilding, Inc.*, 34 BRBS 102 (2000).

Withdrawal of Claim

DIGESTS

A claim cannot be withdrawn in exchange for a sum of money, since Section 15(b) of the Act, 33 U.S.C. §915(b), explicitly provides that an agreement by an employee to waive his right to compensation is invalid. The Board followed Graham, 9 BRBS 1551 (1978), and Gutierrez, 18 BRBS 62 (1986), holding that an approved settlement was not achieved where claimant sought to terminate his compensation claim for a sum of money, but failed to follow the Section 8(i) settlement procedures which include obtaining approval of the deputy commissioner, which was refused. Thus, the claim remained open, as it was never adjudicated. O'Berry v. Jacksonville Shipyards, Inc., 21 BRBS 355 (1988), aff'd in relevant part on recon., 22 BRBS 430 (1989).

The Board reversed the administrative law judge's finding that claimant's failure to take any further action during the three years following his timely modification request constituted an abandonment of his modification claim. Since claimant filed no written request with the deputy commissioner to withdraw his claim, see 20 C.F.R. ' 702.255, and the claim was never adjudicated, it remained open and pending. Madrid v. Coast Marine Construction Co., 22 BRBS 148 (1989).

The deputy commissioner is authorized to approve a request for a withdrawal of a claim if the request is for a proper purpose and is in claimant's best interest, *see* 20 C.F.R. §702.225. The letter from the deputy commissioner "approving the withdrawal" in this case was not an effective withdrawal in that it did not contain a determination as to whether the withdrawal was for a proper purpose and in claimant's best interests. Because the payment or promise of payment for a sum of money was involved in the purported withdrawal in this case, the Board held that the withdrawal was ineffective. *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting).

The Board, in essence, overrules *Rodriguez*, 16 BRBS 371 (1984), in which it held that an "old" claim, which technically remained open, could not be reopened because too much time had passed between the last payment of compensation and the subsequent pursuit of the claim. The instant case is similar in that an attempted withdrawal of the claim was invalid, and claimant thereafter pursued his claim. *Rodriguez* did not discuss the holding in *Intercounty Construction Corp.*, 422 U.S. 1, 2 BRBS 3 (1975), which holds that a claim never adjudicated remains open until an order is issued. The Board consistently has applied *Intercounty* in recent cases. *Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991).

The Board affirmed the administrative law judge's decision to grant claimant's request to withdraw his claim, as the request complied with 20 C.F.R. §702.225. Claimant's request was based on the fact that the state act provided for higher benefits. The Board also notes that the administrative law judge has the authority to approve such a request. *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., dissenting on other grounds).

A claimant may withdraw his claim prior to the adjudication thereof if the provisions of 20 C.F.R. §702.225 are met. Therefore, it is erroneous as a matter of law for the administrative law judge to determine that the regulation is inapplicable merely because the district director neither approved nor disapproved a withdrawal request. Although the administrative law judge has the authority to consider the withdrawal issue, he failed to apply the regulatory criteria, and where claimant obtained new counsel and sent a letter to the district director indicating he wished to pursue his claim, within a few weeks of submitting his withdrawal request, the Board reversed the administrative law judge's finding that claimant validly withdrew his claim. The Board noted that even if the withdrawal was valid, it is without prejudice under the regulation; thus, claimant's letter cancelling the withdrawal could be interpreted a reinstatement of the original claim or a new claim. *Henson v. Arcwel Corp.*, 27 BRBS 212 (1993).

The court notes that the regulations at 20 C.F.R. §702.225 permit the withdrawal of claims under certain circumstances. In this case, where employer requested that claims be transferred to OALJ for a hearing, but claimants requested withdrawal prior to adjudication, the court held that the district court erred in not ruling on this issue in light of its decision to grant a writ of mandamus forcing the claims to be transferred for a hearing. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT)(5th Cir. 1994).

Although the Act does not specifically provide for the withdrawal of a claim, a claimant may withdraw his claim at any time, provided he complies with the regulations. Such a withdrawal is without prejudice to the filing another claim. In a case where the district director permitted claimant to withdraw his claim without prejudice three years after employer filed a request for a hearing and a motion for summary judgment, the Board determined that Rule 41(a) of the FRCP is not controlling, as the situation is governed by 20 C.F.R. §702.225. Further, contrary to employer's argument that a request for dismissal which succeeds a motion for summary judgment violates Rule 41(a)(1), the Board noted that, instead, it invokes Rule 41(a)(2), which, after approval of the court, results in a dismissal without prejudice. Thus, even if Rule 41(a) were applicable, it would not change the outcome of this case. *Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (*en banc*) (Brown, J., concurring), *aff'g on recon*. 27 BRBS 250 (1993) (*en banc*) (Brown, J., concurring), *rev'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1 (CRT), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39 (CRT)(5th Cir. 1996). *See also Crandle v. Ingalls Shipbuilding, Inc.*, 27 BRBS 248 (1993) (order *en banc*)(Brown, J., concurring) (appeal additionally dismissed as untimely).

The Fifth Circuit reversed the Board's holding that the district director's granting claimant's motion to withdraw did not aggrieve employer, and the Board's consequent dismissal of employer's appeal. The district director's failure to forward the cases to the Office of Administrative Law Judges upon employer's request for a formal hearing is a ministerial and nondiscretionary duty. Once a party requests a hearing, the district director loses any authority to act on the claim. The court stated that after the claim was transferred, the administrative law judge could act on claimants' motions to withdraw their claims while safeguarding employer's procedural rights. *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 102 F.3d 1385, 31 BRBS 1 (CRT)(5th Cir. 1996)*, vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996)(court reached the same result based on district director's failure to follow mandamus order, later determined to be inapplicable to this group of cases), *rev'g Boone v. Ingalls Shipbuilding*, *Inc.*, 28 BRBS 119 (1994) (*en banc*) (Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993)*(en banc* (Brown, J., concurring).

The Board affirms the administrative law judge's granting of claimant's motion to withdraw his claim after he considered the regulatory criteria of 20 C.F.R. §702.225(a), and employer's objections to the motion. Based on the Fifth Circuit's initial decision in *Boone*, 81 F.3d 561, 30 BRBS 39(CRT), *rev'd on other grounds*, 102 F.3d 1385, 31 BRBS 1 (CRT), the Board held that employer's procedural rights to a decision in an adjudicative forum were protected, and noted that the court did not address the broader issue of whether a withdrawal, in general, cannot aggrieve employer as it cannot be presently held liable for any benefits. The Board stated that the administrative law judge's subsequent remanding of the case to the district director was for purely ministerial action. *Downs v. Ingalls Shipbuilding, Inc.*, 30 BRBS 99 (1996).

The Board rejected employer’s contention that the claim was properly withdrawn as the withdrawal request was made in exchange for a sum of money. Moreover, as the administrative law judge rationally found that there is no “probative reliable evidence” that the district director approved claimant’s request for withdrawal of his claim as being for a proper purpose or in claimant’s best interest. Therefore, the Board held that the claim was still open for resolution. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon*., 32 BRBS 224 (1998).

On reconsideration, the Board affirmed its previous holding that Section 702.216 is applicable in determining whether there was an effective withdrawal in the instant case, rather than the predecessor regulation which did not require claimant to state in writing the reasons for the withdrawal. Procedural regulations in force at the time the administrative proceedings take place govern, not those in effect at the date of injury. Moreover, the administrative law judge also rationally found that there is no evidence that the district director closed the case after considering claimant’s best interest and whether a withdrawal was for a proper purpose. The Board thus affirmed its remand of the case to the administrative law judge for consideration of the merits of the timely filed and never adjudicated claim. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998), *aff’g on recon.* 32 BRBS 11 (1998).

The Board vacated the administrative law judge's denial of claimant's motion to withdraw his claim, and held that claimant's decision to withdraw his longshore claim to pursue a claim under state law is, as a matter of law, a proper purpose for withdrawing a claim under the Act. Nevertheless, the Board remanded the case for further consideration because, under the regulation at 20 C.F.R. §702.225, the administrative law judge also must consider whether the withdrawal is in claimant's best interest and in this case he did not do so. *Stevens v. Matson Terminals, Inc.*, 32 BRBS 197 (1998).

Where claimant informed the administrative law judge of the fact that he is "no longer pursuing benefits" under the Act and requested that the case be remanded to the district director, the Board held that claimant's motions did not unambiguously declare claimant's intent to withdraw the claim. Consequently, the administrative law judge erred in granting withdrawal and remanding the case to the district director over employer's objections to the motions and its request for a hearing on the merits. The Board vacated the administrative law judge's orders and remanded the case for him to determine claimant's exact intentions and then either consider the motion for withdrawal in accordance with the regulations or hold a hearing on the merits. *Ridley v. Surface Technologies Corp.*, 32 BRBS 211 (1998).

A claim is not withdrawn unless the requirements of Section 20 C.F.R. §702.225(a) are met. An administrative law judge has the authority to enter an order approving a withdrawal request but must determine, consistent with the regulatory criteria, whether the request for withdrawal is for a proper purpose and whether approval is in the claimant's best interest. In this case, where neither an order approving a Section 8(i) settlement nor one granting withdrawal of the claim was entered, the claim remained open and viable. *Petit v. Electric Boat Corp.,* 41 BRBS 7 (2007).

The Board holds that the administrative law judge erred in finding that the claimants' motion to withdraw was not for a proper purpose as required by 20 C.F.R. §702.225(a)(3). The claimants are entitled to pursue a tort remedy in state court, as they have the right to choose the forum in which they will first litigate their cases. The Board declined to address claimants' contention that the administrative law judge erred in assessing the prejudice to employer under this prong of the regulation, noting however, that in a black lung case, the Board agreed with the Director that this factor need not be assessed. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

The Board affirms the administrative law judge's finding that claimants' motion to withdraw was not in their best interests pursuant to C.F.R. §702.225(a)(3). This inquiry is specifically given to the fact-finder. The administrative law judge rationally found that claimants' recovery in state court was speculative, both on a monetary basis and on the claims asserted. Moreover, depending on the success of employer's defenses in state court, claimants could lose the right to refile under the Act, pursuant to Section 13(d). The Board remanded the case to the administrative law judge for adjudication/ruling on employer's motion for summary decision. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

The Fifth Circuit held that the term “claim” refers to the whole of the employee’s demand for compensation, rather than to specific categories of benefits allowed under the Act, and thus only if claimant seeks to retract his claim in its entirety is he obliged to follow the requirements of 20 C.F.R. §702.225(a) for withdrawal. Otherwise, claimants remain free to modify the dates or categories of disability encompassed in their claim when they seek compensation for a single injury. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

In this case claimant filed a letter in 1999 seeking additional benefits, but no further action was taken until over one year later when claimant filed an additional claim in 2000, seeking another type of benefit. The Board held that the 1999 letter constituted a valid motion for modification and concluded that the administrative law judge properly determined that claimant’s inaction for over one year did not constitute a withdrawal of the 1999 claim. He correctly reasoned that once the claim was filed, the district director was obliged to take some action to begin processing the claim, and claimant cannot be held responsible for the district director's failure to act. As the claim had not been withdrawn or adjudicated, the letter filed in 2000 was a permissible amendment to the earlier, open claim. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).